No. 76-705

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE SCHOOL DISTRICT OF OMAHA, STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

BRIAN K. LANDSBERG,
WALTER W. BARNETT,
CYNTHIA L. ATTWOOD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-705

THE SCHOOL DISTRICT OF OMAHA, STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on the issue of relief (Pet. App. 172-175) is reported at 541 F. 2d 708. The opinion of the district court on petitioners' motion for a new trial (Pet. App. 165-169) is not yet reported. The opinion of the district court on the issue of relief (Pet. App. 139-145) is reported at 418 F. Supp. 22. The opinion of the court of appeals on the issue of liability (Pet. App. 100-133) is reported at 521 F. 2d 530. The opinion of the district court on the issue of liability (Pet. App. 41-98) is reported at 389 F. Supp. 293. The opinion of the district court on the motion to intervene (Pet. App. 34-40) is reported at 367 F. Supp. 198. The district court's opinion on the motion for a preliminary injunction (Pet. App. 1-33) is reported at 367 F. Supp. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 172-175) was entered on August 24, 1976. The petition for a writ of certiorari was filed on November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled that the evidence demonstrated that the School District of Omaha had engaged in racial discrimination affecting the operation of the schools.

2. Whether the desegregation plan adopted by the district court and approved by the court of appeals meets constitutional standards.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the District of Nebraska pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6, and filed a motion for a preliminary injunction. On August 31, 1973, the district court denied that motion (Pet. App. 1-34). Thereafter, black students were permitted to intervene as class plaintiffs-intervenors. After trial on the merits, the district court, on October 15, 1974, issued an opinion and order dismissing the suit (Pet. App. 41-99).

It was apparent at the time of trial that there was substantial racial disparity in the student attendance patterns of the Omaha schools. The central question presented, therefore, was whether the School District had engaged in intentional racial discrimination that brought about or maintained that condition (Pet. App. 43). The district court ruled that the United States had failed to meet its burden of proving that the racial separation in Omaha schools was the result of intentional racial discrimination on the part of petitioners (Pet. App. 97).

The court of appeals reversed. It held that once it has been established that school authorities have engaged in acts or omissions, the natural, probable, and foreseeable consequences of which are to bring about or maintain racially disparate attendance patterns, a presumption of discriminatory intent arises, and the burden shifts to the school district to establish that discriminatory intent was not among the factors that motivated its actions (Pet. App. 107-108).

Applying that standard to the facts found by the district court, the court of appeals concluded that the United States had established that school officials had engaged in a pattern of acts that had the foreseeable consequence of bringing about more racial separation in the Omaha schools than would have been caused by neutral actions (Pet. App. 110-129). The court of appeals relied upon evidence establishing that the School District: (1) intentionally assigned black faculty members to identifiably black schools and white faculty members to identifiably white schools, thus intensifying the racial identifiability of the schools (*id.* at 110-113); (2) maintained a student transfer policy that the School District knew had the natural and foreseeable effect of allowing white students to leave the predominantly black schools in the system (*id.* at 114-117);[1] (3) established "optional" attendance zones designed to allow white students to escape being assigned to predominantly black schools, as they would have been if the usual "neighborhood school" policy had been adhered to (*id.* at 118-122); (4) constructed schools so located that they almost always opened identifiably "black" or "white" (*id.* at 123-124); and (5) knowingly took actions that had the "inevitable" effect of creating an overwhelmingly black high school in a white neighborhood of Omaha (*id.* at 124-129).

---

[1]As a result of this policy, adopted in 1964, more than 60 percent of the white students assigned to predominantly black junior high schools in 1970-1972 transferred out (Pet. App. 116).

As to the School District's contention that it had consistently maintained a neighborhood school policy, the court of appeals stated (Pet. App. 124 n. 28):

> [T]he school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy—if one existed—was discarded whenever it would have had an integrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle Schools [sic]. It is an understatement to say, as the Supreme Court found in *Keyes* v. *School District No. 1*, [413 U.S. 189,] 212, that "the 'neighborhood school' concept has not been maintained free of manipulation."

The court of appeals ordered that the faculty be fully integrated by the opening of the 1975-1976 school year and that students be reassigned no later than the 1976-1977 school year (Pet. App. 129-130). The court articulated a set of guidelines to aid the School District in carrying out its responsibility for developing and implementing a comprehensive plan for achieving student reassignment (*id.* at 130-132, 136-137).

The School District filed a petition for a writ of certiorari challenging both the holding that the District had engaged in intentional segregation and the remedial guidelines articulated by the court. This Court denied the petition. 423 U.S. 946.

On remand in the district court, the School District submitted a comprehensive remedial plan. On April 27, 1976, the district court issued an opinion (Pet. App. 139-145) that the School District's plan, as modified

by amendments proposed by the United States, be adopted; on May 24, 1976, the court ordered its implementation (*id.* at 146).

Both plaintiff-intervenors and the School District appealed. The court of appeals *en banc* affirmed, stating that "[i]n our view, the plan meets constitutional standards and is consistent with the mandate of this Court" (Pet. App. 173).

ARGUMENT

The decisions of the courts below are correct, and further review is not warranted.

1. Petitioners contend that the holding of the court of appeals on the standard for proving intent is inconsistent with *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, *Washington* v. *Davis*, 426 U.S. 229, and rulings in other circuits. We disagree. Although the issue decided in *Keyes* is not directly presented here,[2] the Court's reasoning in that case is applicable (413 U.S. at 209-210):

> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, 402 U.S., at 18, we observed that in a system with a "history of segregation," "where it is possible to identify a 'white

[2] In *Keyes* this Court held that proof of intentional segregation of the schools in one area of a school system creates a presumption that other racial separation in the system's schools is the result of intentional racial discrimination. The burden then rests upon the school officials to establish that "segregative intent was not among the factors that motivated their actions" (413 U.S. at 210).

> school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." * * * Nor is this burden-shifting principle limited to former statutory dual systems. * * *

Where, as here, the plaintiffs have established that school officials have over a period of time taken actions that have had the probable, natural, and foreseeable effect of creating more racial separation in the schools than would have existed as a result of neutral and contiguous attendance zones, it is reasonable to require those school officials to come forward with evidence to establish that their action "was a consistent and resolute application of racially neutral policies." *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178, 182 (C.A. 6), certiorari denied, 421 U.S. 963.[3]

The court of appeals in the present case anticipated and applied the standard articulated by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, No. 75-616, decided January 11, 1977, slip op. 12-18, for determining whether racial considerations were a "motivating factor" in the School District's decisions. It examined whether the School District's student assignment policies could be explained on non-discriminatory grounds; it determined that the School District had deviated from its "normal" neighborhood school policy whenever the deviation would produce greater racial separation (Pet. App. 114-122, 124 n. 28);

[3]See *Milliken* v. *Bradley*, 418 U.S. 717, 738 n. 18, where this Court approved the district court's findings of unconstitutional segregation within Detroit. Those findings were based on a consideration of the natural, probable, and foreseeable consequences of school board actions. See *Bradley* v. *Milliken*, 338 F. Supp. 582, 587, 592 (E.D. Mich.).

and it found a pattern of teacher assignments and school construction decisions that could be explained only by the conclusion that racial factors were a major if not the predominant concern of the School District (*id.* at 110-113, 123-124). Petitioners apparently contend that this approach is inconsistent with *Davis, supra,* but they are wrong. "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." *Arlington Heights, supra,* slip op. 12. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts * * * ." *Davis, supra,* 426 U.S. at 242. This is what the court of appeals did here, and correctly so.

There is no need in this case to resolve whatever conflict among the circuits may have predated *Davis* and *Arlington Heights.* In any event, we demonstrated in our brief in opposition (No. 75-270) when petitioners sought review of the court of appeals' previous decision that the decision in the instant case does not conflict with the decisions in other circuits; the Court denied certiorari then, and there is no greater reason to grant review now.[4]

2. Petitioners also contend that the court of appeals erroneously required racial balance throughout the School District and failed to establish "a proportionality between

[4]This does not mean that the United States believes that the important problems concerning the role of intent in school cases have been put to rest by *Davis* and *Arlington Heights.* Far from it; we have asked the Court to grant review in No. 76-212, *Metropolitan School District of Perry Township* v. *Buckley*, and related cases, to address a number of questions that remain unresolved. There is no reason to hold the present petition pending disposition of *Buckley*, however; the decision in the instant case is correct under the standard of intent we have outlined in *Buckley*, and it is correct under any other reasonable standard. Certiorari should be denied in the instant case forthwith so that the process of desegregation in Omaha may go on free from any lingering doubts about its legality. (We have furnished to counsel for the parties in this case copies of our brief in *Buckley*.)

the remedy and the wrong" (Pet. 25). We submit, however, that the remedy adopted by the district court, and approved by the court of appeals, complies with the correct remedial standards.

There is doubtless some tension between the rule, stated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, that "[a]s with any equity case, the nature of the violation determines the scope of the remedy" and the rule, stated in a companion case, that:

> Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

Davis v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37. We read the two statements as meaning that the court's duty is to approve a plan designed to extirpate the effects of the past discrimination, root and branch.[5]

The more pervasive such discrimination and its effects, the greater is the duty of the school district to take affirmative steps to eradicate all of its effects. Where the school authorities have undertaken a course of conduct that labels schools as officially intended for members of one race or the other, the remedy must be designed to eliminate any official racial identity. This will sometimes require a substantial reassignment of studnets, at least in the short run. But some racial imbalance unrelated to school board actions may remain after implementation of the plan. See, *e.g.*, *Swann*, *supra*, 402 U.S. at 26; *Pasadena City Board of Education* v. *Spangler*, No. 75-164, decided June 28, 1976, slip op. 8-11.

---

[5]See our brief in *Buckley*, *supra*, at pp. 16-19.

Within these constraints, the district court's equitable authority in fashioning relief is board,

> for breadth and flexibility are inherent in equitable remedies.
>
> > "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944), cited in *Brown II*, *supra*, at 300.
>
> * * * * *
>
> The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.
>
> * * * * *
>
> [I]n seeking to define the scope of remedial power or the limits on the remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

Swann, *supra*, 402 U.S. at 15-16, 31. The courts below have complied with these standards in fashioning relief in this case.

We agree with the School District's assertion that the goal of a remedial order in a school desegregation case should be to put the school system and its students where

they would have been but for the violations of the Constitution. We believe, however, that the plan ordered into effect by the district court, and approved by the court of appeals, is designed to accomplish that goal, for that goal includes the elimination "root and branch" of the violations and all of their lingering effects. *Green* v. *County School Board*, 391 U.S. 430, 438. The effects must be eliminated wherever they may be found in the school system, and courts must start from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203.

In the previous appeal of this case the court of appeals found evidence of pervasive, intentional discrimination. The court of appeals concluded that (Pet. App. 107 n. 8):

> The district Court found in several instances that the segregative results were not only foreseeable, but that the defendants had conscious knowledge of the likelihood of such results, particularly with respect to faculty assignments, school construction and the deterioration of Tech High.

The court of appeals found that for 23 years, starting in 1940-1941, the School District assigned every black teacher to an identifiably black school (Pet. App. 111). Racially discriminatory teacher assignment policies were continued at least through 1972-1973 (*id.* at 111-113). The court found that the student transfer policy had a "profound" effect upon majority and predominantly black schools (*id.* at 114-117). The court found that the establishment of certain optional attendance zones contributed to the racial identifiability of the two black junior high schools (*id.* at 118-122). The court also found that at least one school (Martin Luther King Middle School) was constructed and opened with an 82 percent black enrollment over the vocal objections of black citizens and community

leaders (*id.* at 123-124). Finally, the court found that the School District's actions "all combined to result" in an overwhelmingly black enrollment in Tech High School—which is located in a white neighborhood (*id.* at 128).

We would not argue, and there has been no finding, that but for this racial discrimination every school in the Omaha School District would have had a racially balanced student enrollment. Cf. *Arlington Heights, supra*, slip op. 13 n. 15; *Austin Independent School District* v. *United States*, No. 76-200, vacated and remanded, December 6, 1976. But the argument of the School District that the effects of the District's racial discrimination are "negligible" and "minimal" is unsupported by the evidence.[6] There can be no doubt that the actions of the School District had a substantial, albeit not precisely measurable, effect on the racial composition of many schools. The district court therefore correctly ordered extensive student reassignments to produce an attendance pattern closer to the one that would have existed but for the violations of the Constitution.

Although we agree that the remedy should not exceed what is necessary to eliminate the effects of the racial discrimination in the operation of the schools, we believe that the School District has failed to show that the remedy in this case is inappropriate under that standard. We believe that the plan adopted by the district court represents an acceptable, if imperfect, effort to tailor the remedy to the violation in light of the School District's failure even to attempt to demonstrate that part of the observed racial separation was not caused by its discrimination—as it is required to do.[7]

---

[6]The School District has made no attempt to show (beyond what is in the record from the original trial) that there have not been extensive systemwide effects of its racial discrimination. Instead, the District is still attempting to litigate the issue whether it engaged in racial discrimination at all.

[7]*Arlington Heights, supra*, slip op. 17-18 and n. 21.

Petitioners argue that the guidelines issued by the court of appeals amount to a requirement of "complete integration of the public schools" (Pet. .33). They do not. If the School District were required to maintain "racial balance" in its schools, all of its schools would be required to have approximately 20 percent black enrollments. The plan adopted by the courts below does not require such shifts in enrollment.[8] The guidelines, even if strictly followed, would allow formerly black schools to remain up to 50 percent black under certain circumstances. That is a very substantial variance from mathematical "racial balance." Furthermore, under the guidelines, schools with as little as 5 percent black enrollment are to be considered integrated. The district court's plan further demonstrates that "complete integration" was not required. Two schools, Franklin and Monmouth Park, retain predominantly black enrollments. The District 67 and Ponca schools are 98 and 100 percent white. Certainly the School District is not being forced to implement "racial balance" with regard to these schools.

---

[8]There is consequently no need to hold this petition pending the Court's decision in *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (C.A. 6), certiorari granted, January 17, 1977 (No. 76-539). In *Brinkman* the court required every school to mirror the racial composition of the entire system, with only a small toleration for deviation. There is a serious question whether this plan is an appropriate remedy in light of the extent of the proved effects of the racial discrimination. There is no similar question here, however, and the plan for Omaha would not be invalidated by the Court's acceptance of our arguments in *Buckley* and the arguments of petitioners in *Brinkman*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

BRIAN K. LANDSBERG,
WALTER W. BARNETT,
CYNTHIA L. ATTWOOD,
Attorneys.

JANUARY 1977.